SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-538

ARTHUR S. SUMBRY, *et al.*,

Petitioners,

—v.—

JOHN H. LAND, Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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No. .....

ARTHUR S. SUMBRY, *et al.*,

Petitioners,

—v.—

JOHN H. LAND, Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered on June 26, 1973, declining to review a decision of the Georgia Court of Appeals which upheld the summary contempt convictions imposed on the petitioners by the respondent.

Opinions Below

The order of the Supreme Court of Georgia denying certiorari is unreported, and is set forth in the Appendix, *infra,* at p. 1a. The opinion of the Court of Appeals of the State of Georgia is reported at 127 Ga. App. 786, 195 S.E.2d 228, and appears in the Appendix, *infra,* at pp. 2a-13a.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on June 26, 1973. The jurisdiction of this Court is based upon 28 U.S.C. Section 1257(3).

Questions Presented

(1) Whether the petitioners' summary contempt convictions, imposed for violation of a restraining order that (a) was entered following an *ex parte* proceeding, (b) was issued two hours before a scheduled march, (c) absolutely prohibited that march, and (d) was inadequately communicated to the petitioners, violated the First and Fourteenth Amendments?

(2) Whether in the circumstances of this case the Due Process Clause of the Fourteenth Amendment required that the judge who issued an *ex parte* restraining order disqualify himself from presiding over the contempt trial of the petitioners for violating the order?

(3) Whether a conviction for contempt in a state court, immediately following a separate trial and conviction for violation of city ordinances governing the identical conduct, violates the double jeopardy protections of the Fifth and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved

In addition to the First, Fifth and Fourteenth Amendments to the United States Constitution, this case also involves Columbus, Georgia Municipal Ordinance No. 71-199, authorizing the proclamation of a civil emergency, set forth in the Appendix, *infra,* at pp. 14a-18a.

Statement of the Case

The petitioners, 81 black men and women, were summarily convicted of contempt on the basis of an *ex parte* restraining order, issued by Respondent John H. Land, Judge of the Superior Court of Muscogee County, Georgia, prohibiting a scheduled march. The background is as follows.

Commencing with the summary dismissal of several black members of the Columbus, Georgia police department on May 31, 1971, members of the black community in Columbus engaged in various First Amendment activities to protest alleged police department discrimination and other forms of racial and economic discrimination in Columbus.[1] On July 24, 1971, during these demonstrations, the city council of Columbus met in special session and adopted an ordinance giving the Mayor of Columbus the power to proclaim the existence of a civil emergency (App., *infra*, pp. 5a, 14a-18a). That same day, the Mayor issued a proclamation declaring that "due to mob action and civil disobedience, a state of emergency exists in Columbus, Georgia," and directing that "all persons are hereby prohibited from gathering on the public streets or sidewalks in groups of twelve (12) or more" (App., *infra*, pp. 5a-6a, 19a).

The petitioners and others had scheduled a march, as a continuation of their protest activities, for Saturday, July 31, 1971 at 2:00 p.m. Six days after the mayor's proclama-

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[1] These activities and official reaction to them gave rise to federal court litigation in *Community Action Group* v. *City of Columbus*, —— F. Supp. —— (M.D. Ga. Civil Action No. 1528, Jan. 31, 1972), *aff'd*, 473 F.2d 966 (5th Cir. 1973), *reh. den.*, 475 F.2d 1404.

tion, on the morning of the scheduled march, J. R. Allen, the Mayor of Columbus, filed a complaint in the Superior Court of Muscogee County seeking to enjoin the protest. Various individuals, a radio station, and the Southern Christian Leadership Conference were designated as defendants. The complaint alleged that those individuals had "caused civil disorders" in Columbus, were planning a demonstration that afternoon in violation of the Mayor's proclamation, and that "as the natural consequence thereof" disorder would occur (App., *infra,* p. 6a). Although the location of all the persons named as defendants was well known, since they were subsequently served with the restraining order, none was given notice of or the opportunity to participate in the hearing.

Based on these allegations, the respondent, Judge John H. Land, then issued an *ex parte* temporary restraining order at 12:00 noon on July 31, 1971, just two hours before the scheduled march was to begin (App., *infra,* p. 7a). The order directed the Sheriff to arrest "the Defendant" in the event of non-compliance with the order, "and bring him before me at the earliest convenient time to be dealt with for contempt" (App., *infra,* p. 7a). The return of service shows that eleven persons were served with the complaint and order on July 31, 1971, and one person was served on August 1, 1971. Only two of the persons served were arrested for participating in the march (App., *infra,* p. 7a).

The march commenced shortly after 2:00 p.m. on July 31, 1971, as scheduled. The order was read to one of the named defendants at a meeting, and subsequently read from a loudspeaker in a police helicopter hovering over the march. During the subsequent contempt proceedings many of the

petitioners testified that they were unable to hear the court order read from the helicopter (App., *infra*, p. 8a).[2]

The eighty-one individuals were first tried in the police court for violation of the city ordinance prohibiting gatherings of more than 12 people, and thereafter brought before Judge Land, where they were tried for contempt for violating the court's retraining order (App., *infra*, p. 8a).

At the very outset of the contempt hearing, before any testimony was taken, Judge Land stated that he was already informed that each defendant had attended the meeting which preceded the march, that they commenced the march, that the court order was read from the police helicopter hovering overhead, and that it was explained to them that the order applied to each and every person there (T1, 3-4). The respondent then asked the assembled petitioners to show cause why they should not be held in contempt, remarking:

> This was a mass order. The Court understands that each of you could not be personally served, nor was it addressed to each of you individually, as such, but to you as a group (T1, 3).

Some of the petitioners explained that they had not heard the order or did not understand it to apply to them, but the respondent was more interested in questioning them about why they would demonstrate in support of police officers who were fired for allegedly refusing to comply

[2] A few of the petitioners did testify that they heard the order being read to Mr. Hammonds, one of the named defendants, at the meeting preceding the march, but did not understand that the order purported to apply to persons not named in the complaint (T1 29-30). ["T1" and "T2" refer to the minutes of the August 2 and August 3, 1971 contempt hearings, respectively.]

with police uniform regulations "notwithstanding their unpatriotic and un-American conduct to the American flag . . ." (T1, 8).[3] When a police witness was called, the court stated: "The information is that they could clearly hear the order from several city blocks away, is that correct?" and the witness replied, "Yes, sir" (T2, 11, 12). When petitioners' counsel asked the court if its mind was made up that a particular petitioner knew or probably knew of the injunction, the court replied in the affirmative, stating that the officers had testified that "everyone in the march could thoroughly hear this injunction read and were advised not to disobey" (T1, 13).[4]

The court then began to try each of the petitioners, rejecting defense requests for written charges, a jury trial, dismissal of charges by virtue of double jeopardy, and disqualification of the judge (T1, 15, 19, 30, 31; T2, 14). The court indicated that the sentence would be 10 days for all but eight of the petitioners, who would receive more severe punishment (T1, 42-44). The hearing adjourned and was continued the following day, August 3, 1971. At the conclusion of the proceedings, all the petitioners were given contempt sentences, of either 10 or 20 days.[5]

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[3] The black officers had been dismissed for removing an American flag patch from their uniforms.

[4] At the second day's hearing, a tape recording of police radio bulletins transmitted at the time of the march indicated that the order being read from the helicopter could not be heard (T2, 31-35).

[5] During the proceedings, Judge Land stated that he had offered to hold court on Sunday, August 1, 1971 and had made up his mind to release everyone except the "ring leaders" on the contempt charges. However, when some of the people in jail refused as Judge Land saw it, to come to court "voluntarily," he changed his mind (T1, 7).

Appeals to the Georgia Court of Appeals were noticed that same day. Thereafter, on August 25, 1971, the respondent entered an order reducing the petitioners' contempt sentences to time served and granting the petitioners' motion to dismiss the case.[6]

On appeal, the petitioners raised all of the issues presented now. Those claims were explicitly considered but rejected by the Georgia Court of Appeals in an opinion filed on November 15, 1972. Thereafter, on June 26, 1973, the Georgia Supreme Court denied a petition for certiorari raising the same issues.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the limitations on the power of municipal authorities, executive and judicial, to interfere with and prohibit the exercise of First Amendment rights of assembly and petition. These questions implicate this Court's decisions in *Carroll* v. *Commissioners of Princess Anne County,* 393 U.S. 175 (1968) and *Walker* v. *Birmingham,* 388 U.S. 307 (1967), both of which were misapplied by the courts below. This case also presents important questions concerning the rights of persons charged with contempt of court for conduct which also gives rise to independent criminal liability.

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[6] The Georgia Court of Appeals subsequently held that those orders did not render the case moot (App., *infra,* p. 8a).

1. The issuance and enforcement of the *ex parte* restraining order upheld by the Georgia courts violated the petitioners' rights under the First and Fourteenth Amendments and conflicted with this Court's decision in *Carroll* v. *Commissioners of Princess Anne County*, 393 U.S. 175 (1968).

In the Georgia courts the petitioners argued that the restraining order that they were charged with violating was issued in contravention of the principles announced in *Carroll* v. *Commissioners of Princess Anne County*, and that their challenges to the validity of the order could not be rejected and the contempt convictions upheld on the basis of the Court's decision in *Walker* v. *Birmingham*. The Georgia courts rejected both contentions and accepted their converse.

In *Carroll*, municipal authorities obtained an *ex parte* restraining order prohibiting the holding of a white supremacist rally scheduled for that evening. This Court held that the issuance of such an order, without notice to the petitioners or a showing that notice was impossible, was invalid. The Court stated that while there might be occasions warranting temporary restraining orders, "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 393 U.S. at 180. Such adversarial participation is particularly important in situations involving public demonstrations and rallies because,

> [t]he facts in any case involving a public demonstration are difficult to ascertain and even more difficult

> to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial assessment of the particular situation in light of legal standards which are inescapably imprecise. 393 U.S. at 183.'

In this case, although a state of civil emergency had been declared almost a week earlier, the court hearing which resulted in the issuing of the injunction was held on the day of the march, and the order issued only two hours beforehand. The city officials were well aware of the names of the officers of the group that was holding the march and the names of the attorneys that represented them, but failed to give any of these persons prior notice of the intent to seek such an injunction. *Carroll* makes it clear that in these circumstances, there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights. Nevertheless, the Georgia Court of Appeals concluded that "allegations contained in the petition supported by the oath of the city's mayor" made to a trial judge "cognizant of the conditions existing in his locality" were somehow sufficient in themselves to remove petitioners' activity from the protection of the First Amendment and the requirements of *Carroll.*

To reach such a result that court seized upon the observation in *Carroll* "that there are special, limited circumstances in which speech is so interlaced with burgeoning

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[7] A number of cases have faithfully applied these standards to cases of *ex parte* injunctions. See, e.g., *Rosen* v. *North Carolina*, 345 F. Supp. 1364 (W.D.N.C. 1972); *Gundlach* v. *Rauhauser*, 304 F. Supp. 962 (M.D. Pa. 1969); *Apple Storage Co.* v. *Consumers Education and Pro. Assoc.*, 272 A.2d 496 (Pa. 1971); *Commonwealth* v. *Guild Theatres, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968).

violence that it is not protected by the broad guarantees of the First Amendment." 393 U.S. at 180. But the activity proposed and abortively engaged in—a protest march on public streets—is certainly entitled to a presumption of First Amendment protection, as this Court has repeatedly held. See, e.g., *Hague* v. *CIO*, 307 U.S. 496 (1939); *Thornhill* v. *Alabama*, 310 U.S. 88 (1946); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 131, 141-142 (1969). To be sure, a considerable amount of violence and racial strife had occurred in Columbus in the weeks preceding the day of the proposed march. But the general existence of racial turbulence in a community cannot serve as blanket justification for prohibiting the specific march attempted by these particular petitioners. See, *Edwards* v. *South Carolina, supra*, 372 U.S. at 233-39; *Cox* v. *Louisiana*, 379 U.S. 536, 549-552 (1965). By proceeding *ex parte*, the respondent denied the petitioners any opportunity to show that the proposed march was constitutionally protected, an opportunity which *Carroll* holds must be afforded in order to assure "the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." 393 U.S. at 183. The failure to afford that opportunity renders the restraining order, and the subsequent contempt proceedings and convictions violative of constitutional requirements.

And when the petitioners attempted to argue that their assembly was constitutionally protected and that the municipal authorities had demonstrated no compelling interest in preventing the march, they were met with the response that *Walker* v. *Birmingham, supra*, foreclosed such contentions (App., *infra*, pp. 12a-13a). But this case is distinguishable from *Walker*. There, a sharply divided Court

upheld the jurisdiction of Alabama contempt convictions based upon violations of an *ex parte* order prohibiting marches without a permit. The state courts refused to consider the demonstrators' challenges to the constitutionality of the injunction because there had been no motion to dissolve the order and no effort to apply for a permit. 388 U.S. at 311-12. This Court affirmed the convictions, but emphasized the fact that the petitioners had had ample time —a period of several days—to challenge the validity of the injunction, and indicated that there might be a different result where the petitioners could not have obtained expeditious review of the injunction or where the injunction was void on its face or transparently invalid. 388 U.S. at 318-19.

This case presents precisely such a situation. The restraining order was issued a scant two hours before the enjoined march was scheduled to begin. There was no opportunity to stay the respondent's order or move to dissolve it, and there was absolutely no possibility of judicial redress before the commencement of the march.[8] Moreover, the order contained an absolute prohibition on First Amendment activity of the kind which many courts have invalidated. See, e.g., *LeFlore* v. *Robinson,* 434 F.2d 933 (5th Cir. 1970), *vac. on other grds.,* 446 F.2d 715 (5th Cir. 1971) (ordinance prohibiting more than six persons demonstrating in front of business or public facility held fa-

[8] As the Fifth Circuit has observed, "[i]f there had been no opportunity to contest the unconstitutional order, as for example, if it had been issued at the very moment the march was scheduled to commence, then the premise that effective judicial remedies were available would be undermined and the result [in *Walker*] would likely have been different." *United States* v. *Dickenson,* 465 F.2d 496, 511 (5th Cir. 1972), *remanded,* 349 F. Supp. 227 (M.D. La. 1972), *aff'd,* 476 F.2d 373 (1973), *pet. for cert. filed,* 41 U.S. Law Week 3609 (May 9, 1973).

cially invalid); see also, *Wood* v. *Goodson*, 485 S.W.2d 213 (Sup. Ct. Ark. 1972); *In re Berry*, 68 Cal.2d 137 (Sup. Ct. Cal. 1968); *State ex rel. Superior Court of Snohomish County* v. *Sperry*, 483 P.2d 608 (Sup. Ct. Wash. 1971) (*en banc*); *In re Oliver*, 452 F.2d 111 (7th Cir. 1971). Indeed, even *Walker* did not involve a complete prohibition on First Amendment activity, but only an order requiring the petitioners to seek a parade permit before demonstrating.

The petitioners here, however, were put to the constitutionally impermissible choice between, on the one hand, acquiescing in an indefinite postponement of their proposed march by virtue of a transparently invalid order which they had no opportunity to challenge, or, on the other hand, risking a contempt citation by exercising their First Amendment rights. And then they were not allowed to argue that their march was constitutionally protected. Only a grave misreading of *Walker* could allow such a result. For if *Walker* is allowed to control situations like the one here, the effect is to overrule, *sub silentio*, the requirements of *Carroll*. See, Dobbs, *Contempt of Court: A Survey*, 56 Col. L. Rev. 185, 217 (1971).

2. The ruling below conflicts with this Court's decisions governing disqualification of judges.

The Georgia Court of Appeals upheld Judge Land's participation in the contempt proceedings, despite his adversarial role and embroilment in those proceedings, on the ground that the contemptuous acts had not occurred in court, and that "[a]lleged prejudice or bias of a judge which is not based on interest either pecuniary or a relationship to a party within a prohibited degree, affords no legal ground for disqualification." (App., *infra*, p. 9a).

This Court has long held that a fair trial in a fair tribunal is a basic requirement of due process. See, *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955). Due process may be denied by a tribunal with fixed opinions, cf. *Irvin* v. *Dowd*, 366 U.S. 717 (1961), or by circumstances that create even the likelihood or appearance of bias regardless of whether actual bias is shown. See, e.g., *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Ward* v. *Village of Monroeville, supra; In re Dellinger*, 461 F.2d 389 (7th Cir. 1972); *United States* v. *Seale*, 461 F.2d 345 (7th Cir. 1972); see also, *Illinois* v. *Allen*, 397 U.S. 227 (1970). Although *Mayberry* involved an in-court contempt, the same rule should apply to out of court contempt where there is a likelihood of bias. See *United States* v. *Zarowitz*, 326 F. Supp. 90 (C.D. Cal. 1971).

Such a likelihood of bias is strikingly apparent in this case. The circumstances surrounding the demonstration and the events which led to the issuing of the court order were extraordinarily controversial in the local community. Judge Land issued the temporary restraining order in an *ex parte* fashion and directed the immediate arrest of anyone who breached that order. In his eagerness, he attempted to bring the petitioners from jail for trial on Sunday, August 1, 1971, before they even had an opportunity to retain counsel. In such circumstances a trial judge should be disqualified from hearing alleged violations of such an order.

Furthermore, such action is particularly required where, as here, the record reflects that the judge had adopted an adversary posture with respect to the alleged contemnors.

In re Murchison, 349 U.S. 133 (1955); *United States* v. *Meyer*, 462 F.2d 823, 841 (D.C. Cir. 1972); *United States* v. *Hoker*, —— F.2d ——, 13 Cr. L. Rep. 2524 (5th Cir. August 8, 1973). Judge Land's active role as prosecutor, as well as judge, is reflected by his evident *ex parte* communications with police officers concerning the actual facts of the alleged contempts and his lack of objectivity once he had convicted the petitioners.[9]

The court's adversary role is also manifested by its political or racial antagonism toward the petitioners, which should have required disqualification. *Johnson* v. *Mississippi*, 403 U.S. 212 (1971); cf. *Berger* v. *United States*, 255 U.S. 22 (1921); *United States* v. *Townsend*, 478 F.2d 1072 (3rd Cir. 1973). Throughout the trial, Judge Land questioned the petitioners' motives, condemning the conduct of the seven black police officers whose dismissal prompted the demonstrators to protest. In *Johnson* v. *Mississippi*, *supra*, the Court held that when a circuit judge in a contempt proceeding had made intemperate and biased remarks concerning civil rights litigants and was himself a defendant in a civil rights suit, "it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before an unbiased judge is essential to due process." *Johnson* v. *Mississippi*, *supra* at 215. The same rule should have been applied here.

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[9] Judge Land denied appeals bonds and supersedeas, which had to be secured from the appellate courts. See Motion for Supersedeas (Aug. 5, 1971). That Judge Land was attempting by this action to render the case moot, and thereby defeat petitioners' attempts to secure judicial review is confirmed by his action, well after notice of appeal had been filed, to reduce the sentences to time served (App., *infra*, at 8a).

3. This Court should decide whether the protection against double jeopardy applies to contempt convictions for the identical conduct which gave rise to independent criminal liability.

The basic thrust of the protection against double jeopardy is that there shall not be multiple punishments for the same act, *Ball* v. *United States,* 349 U.S. 81 (1955); *Prince* v. *United States,* 352 U.S. 322 (1937); *Heflin* v. *United States,* 358 U.S. 415 (1959), a safeguard fully applicable to state proceedings. *Benton* v. *Maryland,* 395 U.S. 784 (1969); see *Ashe* v. *Swenson,* 397 U.S. 436, 437 n. 1 (1970).

In *Waller* v. *Florida,* 397 U.S. 387 (1970), the petitioner was charged with the violation of two municipal ordinances, destruction of city property and disorderly breach of peace. Thereafter, a separate prosecution was brought in the state court system for grand larceny, "based on the same acts of the appellants as were involved in the violation of the two city ordinances." 397 U.S. at 390. Rejecting the claim that the municipality and state were separate sovereignties, the Court held that the petitioner could not be tried by both the municipal government and the State of Florida and that the second trial improperly placed the petitioner twice in jeopardy.

Here, on Monday morning, August 2, 1971, the petitioners were first taken to the Recorder's Court and convicted of violating the Mayor's July 24 proclamation banning gathering in groups of 12 or more; each person was given a 30-day suspended sentence. Next, the petitioners were convicted for violating the city parade ordinance and

given sentences of 30 days or a $159.00 fine. Finally, they were then taken across the street to the Superior Court and convicted for contempt of that court, for marching and parading in violation of the respondent's *ex parte* order. All three prosecutions and convictions were based upon the same events—the July 31, 1971 march. Clearly, therefore, the convictions for violating the mayor's proclamation and the parade ordinance were for the "same transaction" as the conviction for violating the restraining order. *Waller* v. *Florida, supra,* 397 U.S. at 395-96 (Brennan, J., concurring); *Ashe* v. *Swenson,* 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring); *Robinson* v. *Neil,* 409 U.S. 505, 511 (1973) (Brennan, J., concurring).[10]

The Georgia Court of Appeals rejected this argument, holding that the "Constitutional inhibition against double

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[10] While this Court has never held that the rule against double jeopardy must apply to subsequent prosecutions arising out of the "same transaction", see e.g., *Ashe* v. *Swenson,* 397 U.S. 436, 453-54 (1970) (Brennan, J. concurring); *Grubb* v. *Oklahoma,* 409 U.S. 1017 (1972) (Brennan, J. dissenting), in present circumstances that test may be necessary to fully preserve the protection intended by the double jeopardy clause. At its inception, in early common law, the defense of double jeopardy was well equipped to deal with successive prosecutions, as criminal statutes were broad in coverage and few in number. However, the modern age of criminal procedure has witnessed a proliferation of criminal statutes, which have combined to make the same evidence test "almost universally regarded as totally ineffective to implement the important double jeopardy guarantee of preventing successive prosecutions." *Commonwealth* v. *Campana,* —— Pa. ——, 304 A.2d 432, 437 (1973). Thus, a number of states and authorities have recently adopted the "same transaction" test urged by Justice Brennan. See, e.g., *State* v. *Brown,* 497 P.2d 1191 (Ore. 1972) (*en banc*); *People* v. *White,* 41 Mich. App. 370, 200 N.W.2d 326 (1972); *Commonwealth* v. *Campana, supra;* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance, Sec. 1.3 (Approved Draft, 1968); ALI Model Penal Code §107(2) (1962).

jeopardy is not applicable to cases of contempt." (App., *infra,* pp. 10a-11a). This ruling conflicts with decisions of this Court which have held that contempt of court is a crime in every essential respect. See, e.g., *Bloom* v. *Illinois,* 391 U.S. 194 (1968). Accordingly, the protection against double jeopardy for charges arising out of the "same transaction" should apply to charges which take the form of contempt of court.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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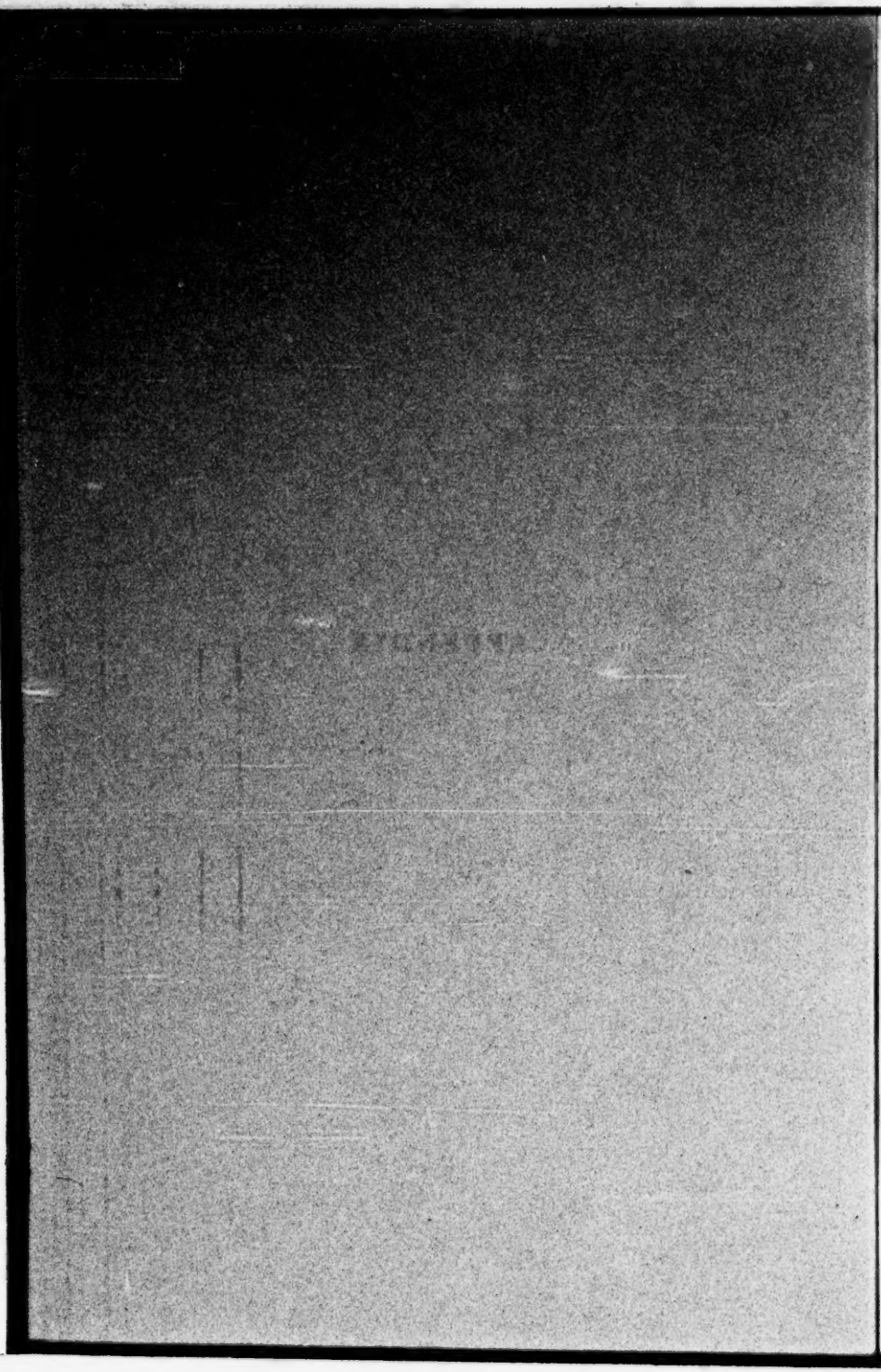

Order of the Supreme Court of Georgia

SUPREME COURT OF GEORGIA

ATLANTA, June 26, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Arthur S. Sumbry et al. v. John H. Land, Judge.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of costs, $30.00.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, June 26, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that the bill of costs was paid by American Civil Liberties Union Foundation, Inc.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

JOLINE B. WILLIAMS,
Clerk.

Opinion of the Georgia Court of Appeals

Nov. 15, 1972

EBERHARDT, P.J.

DEEN & CLARK, JJ.

47316. C-66

SUMBRY *et al.*,

v.

LAND, JUDGE.

CLARK, Judge. "It was the best of times, it was the worst of times . . ." Those words which Charles Dickens used to open his novel *A Tale of Two Cities* apply appropriately to Columbus, Georgia, in the summer of 1971. The optimistic phrase refers to the hopeful outlook created for that community by consolidation of the governments of the City of Columbus and County of Muscogee so that a new body politic, known as "Columbus, Georgia", came into existence on January 1, 1971 (Ga. Laws 1969, 3571 et seq.). See Hart v. Columbus, 125 Ga. App. 625 (188 SE2d 422). The pessimistic phrase applies to the unhappy occurrences which ended in the instant appeal plus other litigation here and in the federal courts. See Diamond v. State, 126 Ga. App. 580 (191 SE2d 492) and Community Action Group v. City of Columbus, —— F. Supp. —— (Civil Action No. 1528, M.D. Ga.), presently under appeal to the U. S. Court of Appeals for the Fifth Circuit as Case No. 72-1650.

Hon. J. Robert Elliott of the United States District Court for the Middle District, in his order dated January 31, 1972, exercised judicial abstention and refrained from pass-

ing upon those "matters which are the subject of an appeal which is pending before the Georgia Court of Appeals." Although we have had the benefit of reading his order and through courtesy of the attorneys have been provided with copies of the briefs filed with the Court of Appeals for the Fifth Circuit, we have limited our consideration to the pleadings and transcript of the Muscogee Superior Court proceedings as we are not authorized to consider facts aliunde the record. Lamb v. Nabers, 224 Ga. 396(1) (162 SE2d 336); Airport Associates v. Audioptic Instructional Devices, Inc., 125 Ga. App. 325(2) (187 SE2d 567).

Counsel for both appellants and appellee have been most helpful to this court in having supplied brilliant briefs wherein they have explored in depth the legal questions. We have supplemented their research on our present-day problem of legalities involved in handling mass arrests[1] by reading the reports compiled by the National Commission on the Causes and Prevention of Violence, To Establish Justice, To Insure Domestic Tranquility and applicable law review articles. Among these was that written by Sanford J. Rosen, one of counsel of record, published in 37 Geo. Wash. L. Rev. 435 (March 1969) wherein he concluded his perceptive article by stating ". . . I have discovered no reasonably sensitive methods, other than hindsight, for determining either the morality or any other virtue of the goals and motives of the civilly disobedient."

Mr. Rosen's reference to "hindsight" applies here in that appellate courts have the benefit of such "Monday morning quarter-backing" when reviewing decisions made by trial judges. This is of direct relevance to the instant appeal

[1] In August 1972 the National Conference of Commissioners on Uniform State Laws discussed the "fourth tentative draft" of a Uniform Public Assembly Act.

where we are required to pass upon the conduct of a trial judge in his handling of contempt charges against 81 defendants that he sentenced to jail terms for alleged violation of a restraining order which he had issued forbidding a parade demonstration which appellants describe as follows: "Following the dismissal of several black members of the Columbus, Georgia Police Department for alleged failure to comply with regulations of the Police Department,[2] black people in Columbus have engaged in various First Amendment protected protest activities against the discharge and suspension of these and other black policemen and against other aspects of racial and economic discrimination in Columbus." These background factors are not contained in our record which consists of the petition, the restraining order, the contempt rule, various defense motions which will be dealt with hereafter as adverse rulings recited as enumerations of error and the transcript of the contempt hearing which ended in jailing these appellants, together with a subsequent dismissal of the complaint upon motion of the petitioner therein and an "Order of Court Amending Sentences" which reduced the sentences to the time served by each. Prior to such dismissal and reduction of sentence appellants had filed a Notice of Appeal and request for supersedeas. When such request was denied appellants petitioned our Court of Appeals which ordered "that a supersedeas be granted to stay the operation of the contempt judgment until the said judgment can

[2] The U. S. District Court order states that "While picketing in front of the Police Headquarters 7 black officers who were participating in the picketing assembled the news media, and, after a lengthy pronouncement against the Police Department and the Chief of Police and all of their superiors, made a public display of removing the United States flags from their uniforms, the flag being a prescribed part of the uniform."

be reviewed by this Court." (Vol. 16, Minutes, page 193, dated August 6, 1971).

The instant case had its inception on July 31, 1971, with presentation to Superior Court Judge John H. Land of a verified petition by J. R. Allen as plaintiff, he designating himself as being the complainant in his representative capacity as Mayor of Columbus, Georgia as well as a property owner, as a taxpayer, and also individually. Various persons, a radio station, and the Southern Christian Leadership Conference were designated as defendants. From the complaint we summarize the following:

"Defendants, together with other individuals, have on numerous occasions caused civil disorders to exist in the above mentioned city, since the 21st day of June, 1971, and have continued and are continuing to cause civil disorders resulting in property damage in the excess of $1,000,000.00 with said city, and danger to the life, limb and security of the plaintiffs and other residents, taxpayers and citizens of Columbus, Georgia." (Paragraph 3)

The Columbus City Council unanimously adopted on July 24, 1971, an ordinance, certified copy being attached, which empowered petitioner J. R. Allen as Mayor "to proclaim the existence of civil emergency . . . and authorizing the Mayor to issue such other orders as he deemed necessary for the protection of life and property on said date." (Paragraph 4). In passing the ordinance on July 24, 1971, City Council provided as a part thereof "That an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect immediately." That same day the Mayor issued a proclamation "that a state of emergency exists within Columbus, Georgia and prohibited assembly of

groups of twelve or more persons upon the streets and sidewalks of Columbus, Georgia." (Paragraph 4).

The assertion was made "that defendants and others are planning to form a demonstration consisting of more than twelve individuals, large and riotous crowds within territorial limits of the said consolidated government on or about 2:00 o'clock P.M., EDT, on the 31st day of July, 1971, the dissemination of this plan being broadcast in interstate commerce by Radio Station WOKS." (Paragraph 5).

Paragraph 6 recites "Columbus, Georgia, has been injured and damaged in excess of $200,000.00 and cost incurred by its police and fire departments, as a result of combating fires caused by defendants and others. The individual citizens of said city have suffered property damage in excess of $1,000,000.00.

The complaint further says that in derogation of the proclamation defendants "plan to march through said Columbus, Georgia, and that as the natural consequence thereof, a civil disorder will occur, there will be personal injuries and property damage, which plaintiff seeks to prevent." (Paragraph 7).

Paragraph 8 avers "irreparable damage and harm will be done to plaintiffs, to the taxpayers, to the residents, to the property owners and to the general public residing within said city, in the event defendants are not restrained from further gatherings, parades, demonstrations and inciting to riot. Plaintiff has exhausted all other means to avoid the imminent danger and violence."

Paragraph 9 read "By this complaint, plaintiff seeks to avoid and prevent property damage, violence, personal injury and possible deaths, which is likely to result from the planned and intended unlawful assembly and riot to be promoted and committed by the defendants and other persons acting with them."

The prayers are for a restraining order prohibiting the defendants from carrying out their proposed march and plans for a temporary and permanent injunction; for assignment of a hearing date; and for such other relief as might be proper.

Upon this petition being presented, Judge Land issued a restraining order at 12 noon on July 31, 1971. This forbade "the defendants named, their agents and servants, and any persons acting under their command and direction or acting in concert with either from participating in or carrying out the described unlawful assembly and march heretofore scheduled for 2 o'clock p.m., July 31, 1971, or at any other time until further order of this court." A paragraph therein directed law enforcement officers to arrest any violator of the order "and bring him before me at the earliest convenient time to be dealt with for contempt." Additionally the named defendants were to show cause on August 3, 1971, why the prayers for temporary injunction should not be granted. Direction was given that "a copy of this Complaint and Order be served upon the named defendants or their agents as soon as possible." The return of service on the parties named as defendants shows service to have been made on eleven of them on that date with the twelfth defendant being served the next day. Only two of those named as defendants participated in the march that took place shortly after 2 p.m. on July 31, 1971, as scheduled.

The transcript of the hearing shows the restraining order to have been read at a meeting of the marchers held immediately prior to commencement of the march and that the order was also read several times over a loud speaker from a helicopter hovering over the march before the pro-

cession started. There was testimony from police officers with reference to the loudness and clarity of the reading of the order but some defendants contended the clatter from the helicopter prevented them from hearing it. The march proceeded with lines of control being established by a police cordon and after the group had walked for a block they were arrested.

The eighty-one individuals here involved were first tried in the police court for violation of the city ordinance and thereafter brought before the superior court judge and charged with contempt of court by allegedly violating the court's restraining order. For two days defendants were tried singly and in groups. Appellants are those the court ruled to have been guilty of contempt of court. Some were sentenced to serve 10 days while others were sentenced to serve 20 days. *Held*:

1. First we must determine if petitioner's dismissal of the proceeding in the superior court with the Judge's approval and the amending order by the trial judge changing the sentences to the days already served made this appeal moot within the rulings of Miller v. Land, Judge, 126 Ga. App. 172 (190 SE2d 133) and Cagle v. PMC Dev. Co., 227 Ga. 309 (180 SE2d 545). As the trial court was without jurisdiction to supplement its judgment after appellants filed their notice of appeal on August 3, 1971, the appellants are entitled to have the legality of their convictions reviewed. Jackson v. Martin, 225 Ga. 170, 172 (167 SE2d 135); Aetna Cas. & Surety Co. v. Bullington, 227 Ga. 485(1) (118 SE2d 495); Hartman v. Brady, 117 Ga. App. 828 (162 SE2d 246). See also Carroll v. Com'rs of Princess Anne, 393 U.S. 175, 21 LE2d 325, 89 SC 347.

2. The first enumeration contends the trial court erred in not disqualifying himself from hearing the contempt citations involved in disobedience of his restraining order. The problem of a judge recusing himself has been the subject of considerable discussion in recent publications.[a] Appellants contend the transcript shows "that Judge Land had let himself get personally involved in this case" and argues that even though these contempts were not committed in the presence of the court that the direction for trial judges given in Mayberry v. Pennsylvania, 400 U.S. 455 (—— LE2d ——, —— SC ——) (1971) required him to declare himself disqualified. It should be noted that Mayberry involved disruptive conduct in court and is therefore not binding upon the trial judge here which did not involve an in-court contempt. Our Supreme Court ruled in Tibbs v. Atlanta, 125 Ga. 18, 21 (53 SE 811) that "Prejudice or bias on the part of the judge, not based on interest, nor on any other ground not named in the statute, exhibition of partisan feeling, or unnecessary expression of opinion upon the justice or merits of the controversy, are, as a general rule, not assignable as a ground for disqualification." Also Elder v. Camp, 193 Ga. 320(1) (18 SE2d 622) from which Justice (later Chief Justice) Almand quoted with unanimous concurrence of his colleagues in Jones v. State, 219 Ga. 848 (136 SE2d 848) as follows: "Alleged prejudice or bias of a judge which is not based on an interest either pecuniary or relationship to a party within a prohibited

[a] An example is the study contained in the Los Angeles Times of October 30, 1972, dealing with the United States Supreme Court captioned *Can a Justice be Sure He is Just?* and which quoted Justice Frankfurter's famous dictum in Public Utilities Com. v. Pollak, 343 U.S. 451, that "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact."

degree, affords no legal ground of disqualification." In accord is Hendricks v. State, 34 Ga. App. 508(2) (130 SE 539) which dealt with a contempt rule and a trial judge's alleged activities.

3. Appellants contend error because they were denied a trial by jury. They argue the instant case had "more of the attributes of a criminal proceeding than of a civil" so that they had the constitutional right to a jury trial. Our Supreme Court has ruled there is no right to jury trial for a contempt proceeding brought for violation of a restraining order. Hortman v. Georgia Board of Dental Examiners, 214 Ga. 560 (105 SE2d 732) which followed Gaston v. Shunk Plow Co., 161 Ga. 287, 299 (130 SE 580).

4. The third enumeration of error contends violation of our constitutional provisions against double jeopardy in that the contempt convictions were for the same actions in which the appellants were found guilty of violating the city ordinance in the Recorder Court. Appellants point out that the basic thrust of the double jeopardy rule is that there should not be multiple punishments for the same act. Bell v. U. S., 349 U. S. 81 (—— LE2d ——, —— SC ——); Heflin v. U. S., 358 U. S. 415 (—— LE2d ——, —— SC ——) and contend that Waller v. Florida, 397 U. S. 387 (—— LE2d ——, —— SC ——) held a person may not be tried for the same offense in both municipal and state courts since both are part of our sovereign judicial system. We do not accept such thesis as being applicable because we view the instant cases as involving two different offenses. One involved a city ordinance and the other was wilful refusal to comply with the directions of a court order. Accordingly, this case comes within Garland v. State, 101 Ga. App. 395, 396(5) (114 SE2d 176) which held "The consti-

tutional inhibition against double jeopardy is not applicable to cases of contempt." See also Macon v. Massey, 214 Ga. 589 (106 SE2d 23).

5. The enumerations of error numbered 4, 7 and 8 attack the contempt sentences on the basis that all of the appellants with two exceptions (these being the two who were designated as defendants) were not personally served with notice of the restraining order and thus were deprived of an opportunity to rebut the allegations. "A defendant is bound to obey an injunctive order from the time he has knowledge of it, though not then actually served." Patten v. Miller, 190 Ga. 152, 153(3) (8 SE2d 786) and Murphey v. Harker, 115 Ga. 77(5) (41 SE 585). We find no merit in these enumerations of error.

6. Appellants aver their constitutional rights were violated by the court's issuance of the restraining order without prior notice and cite Carroll v. President & Comr's of Princess Anne, 393 U. S. 175 (—— LE ——, —— SC ——) as supporting this contention. In doing so they point out that the proposed demonstration was an exercise of First Amendment rights and quote from Justice Fortas's opinion at page 180 that "It was issued *ex parte,* without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." They recognize Justice Fortas also went on to say there might exist "special, limited

circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment." From the secluded ivory tower of an appellate judge's chambers it would be brazen effrontery for us to disregard the allegations contained in the petition supported by the oath of the city's mayor as representative of all of the people of his municipality to a trial judge already cognizant of the conditions existing in his locality. These allegations brought this case within the purview of the "special, limited circumstances" which Justice Fortas recognized could exist and for which he quoted from Cantwell v. Connecticut, 310 U. S. 296 at page 308: "[N]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot."

7. The next enumeration contends error in the ruling that appellants were guilty "of violation of the order in that such a finding was contrary to the evidence." We have carefully read the transcript. There were conflicts between testimony of the police officers and the appellants, which make our consideration of this enumeration of error a matter of credibility of witnesses. "The trial judge had the privilege of accepting as true that evidence which most commended itself to his approval." Young v. Durham, 15 Ga. App. 678, 679(3) (84 SE 165). We must rule adversely to appellants on this enumeration.

8. The remaining enumerations of error are dealt with as a group in the briefs and we will do likewise. Contending the restraining order to have been legally void, appellants base this contention upon a number of U. S. Supreme Court cases which are cited under three captions: "(a) Assemblages are protected by the First Amendment; (b) Governmental interests which are not compelling do not justify

limiting speech and assemblies; (c) the city government has no compelling interests in preventing this assemblage." A study of these citations have led us to the conclusion they are not applicable. We submit the case here comes within the U. S. Supreme Court's statement at page 315 in Walker, et al. v. City of Birmingham, 388 U. S. 307 (—— LE ——, —— SC ——), "Without question, the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners [appellants] and over the subject matter of the controversy."

Having jurisdiction the chancellor (as he is sometimes called when acting in chancery) undertook to exercise the powers inherent in all courts. In doing so, and if not otherwise disqualified from acting, he had the power to pass upon the evidence as to whether or not the eighty-one appellants wilfully violated the terms of the equity court's restraining order. Under these circumstances the Supreme Court of Georgia, whose decisions are binding precedents upon this court (Ga. Const. Art. VI, Sec. II, Para. VIII, Code § 2-3708), provides the key to the decision that is to be made in this court in the case of Carroll v. Celanese Corp., 205 Ga. 493 (54 SE2d 221), headnote 4 thereof reading as follows: "Whether a contempt of court has been committed in the violation of an injunctive order, and how it shall be treated, are questions for the discretion and judgment of the court that issued the order, and its discretion will not be interfered with by this court unless there is an abuse of discretion. If there be any substantial evidence from which the judge could have concluded that his order had been violated, his finding to that effect cannot be disturbed by this court, in so far as sufficiency of the evidence is concerned. (Citations)." We find no abuse of discretion and no error.

Judgment affirmed. Eberhardt, P. J., and Deen, J., concur.

Columbus, Georgia Ordinance No. 71-199 (July 24, 1971)

AN ORDINANCE

No. 71-199

An Ordinance authorizing the Mayor of Columbus, Georgia, to proclaim existence of civil emergency; authorizing the Mayor to impose curfew during civil emergency; authorizing the Mayor to regulate the conduct of certain businesses during civil emergency; prescribing penalty for violation; and declaring an emergency.

WHEREAS, the Council of Columbus, Georgia, deems it necessary for the protection of life and property and for the preservation of the public peace and safety to grant certain executive powers to the Mayor during the existence of a civil emergency.

NOW, THEREFORE, THE COUNCIL OF COLUMBUS, GEORGIA, HEREBY ORDAINS:

SECTION 1.

Definitions:

(a) A civil emergency is hereby defined to be:

(1) A riot or unlawful assembly characterized by the use of actual force or violence or any threat to use force if accompanied by immediate power to execute by three or more persons acting together without authority of law.

(2) Any natural disaster or manmade calamity including flood, conflagration, cyclone, tornado, earthquake or explosion within the limits of Columbus, Georgia, resulting in the death or injury of persons or the destruction of property to such an extent that extraordinary measures must be taken to protect the public health, safety and welfare.

(b) Curfew is hereby defined as a prohibition against any person or persons walking, running, loitering, standing or motoring upon any alley, street, highway, public property or vacant premises within the limits of Columbus, Georgia, excepting persons officially designated on duty with reference to said civil emergency.

SECTION 2.

When in the judgment of the Mayor a civil emergency as defined herein is deemed to exist he shall forthwith proclaim in writing the existence of same.

SECTION 3.

After proclamation of a civil emergency by the Mayor, he may order a general curfew applicable to such geographical areas of Columbus, Georgia, or to Columbus, Georgia, as a whole, as he deems advisable and applicable during such hours of the day or night as he deems necessary in the interest of the public safety and welfare.

SECTION 4.

After proclamation of a civil emergency, the Mayor of Columbus, Georgia, may also, in the interest of public safety and welfare, make any or all of the following orders:

(a) Order the closing of all retail liquor stores.

(b) Order the closing of all beer taverns.

(c) Order the closing of all private clubs or portions thereof wherein the consumption of intoxicating liquor and/or beer is permitted.

(d) Order the discontinuance of the sale of beer.

(e) Order the discontinuance of selling, distributing or giving away gasoline or other liquid flammable or combustible products in any container other than a gasoline tank properly affixed to a motor vehicle.

(f) Order the closing of gasoline stations and other establishments, the chief activity of which is the sale, distribution or dispensing of liquid flammable or combustible products.

(g) Order the discontinuance of selling, distributing, dispensing or giving away of any firearms or ammunition of any character whatsoever.

(h) Order the closing of any or all establishments or portions thereof, the chief activity of which is the sale, distribution, dispensing or giving away of firearms and/or ammunition.

(i) Issue such other orders as are imminently necessary for the protection of life and property.

SECTION 5.

Any person violating the provisions of this Ordinance or executive order issued pursuant thereto shall be guilty of an offense against Columbus, Georgia, and shall be punishable by a fine not exceeding Two Hundred Fifty Dollars ($250.00) or imprisonment not exceeding ninety (90) days, either or both, in the discretion of the Recorder.

SECTION 6.

If any part, article, section, or subdivision of this ordinance shall be held unconstitutional or invalid for any reason, such holding shall not be construed to invalidate or impair the remainder of this ordinance, which shall continue in full force and effect notwithstanding such holding.

SECTION 7.

That an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect immediately.

Introduced and read at a special called meeting of the Council of Columbus, Georgia, held on the 24 day of July, 1971 and adopted at said meeting by the affirmative vote of 10 members of said Council.

Councilman Batastini voting Yes.
Councilman Binns voting Yes.
Councilman Forte voting Yes.
Councilman Illges voting Yes.

Councilman Land voting Yes.
Councilman McClung voting Yes.
Councilman McDaniel voting Yes.
Councilman Rigdon voting Yes.
Councilman Turgeon voting Yes.
Councilman Wright voting Yes.

This ordinance received, signed by the Mayor, at 11:15 o'clock P.M. on the day of JUL 24, 1971, and became law at said time received.

Sec. 3-202(2)

LEMUEL H. MILLER, JR.
Clerk

J. R. ALLEN
Mayor

LEMUEL H. MILLER, JR.
Clerk

Mayoral Proclamation (July 24, 1971)

PROCLAMATION

I, J. R. ALLEN, Mayor of Columbus, Georgia, by virtue of the power vested in me by the provisions of Ordinance Number 1/199 do hereby declare and determine that due to mob action and civil disobedience, a state of emergency exists within Columbus, Georgia;

All persons are hereby prohibited from gathering on the public streets or sidewalks in groups of twelve (12) or more. Any person disobeying this proclamation shall be punishable by a fine not exceeding Two Hundred Fifty Dollars ($250.00) or imprisonment not exceeding ninety (90) days, either or both, in the discretion of the Recorder.

This proclamation shall be effective immediately and shall extend until terminated by proclamation.

J. R. ALLEN
MAYOR of Columbus, Georgia

Attested By:

LEMUEL H. MILLER, JR.
Clerk of Council
Columbus, Georgia

7/24/71
11:41 P.M.